The excess of $9,000 shown in the Company's Ledger as "increment of selling price" was only credited to the Company one year later on December 31st, 1970 because Sjarif, according to the defendant, did not pay up in full till October, 1970.

The Company went into liquidation on 14th July 1972.

The question is whether the profit of $9,000 made by the Company and credited it by the defendant in his capacity as its Managing Director when he himself was appointed the plaintiff's agent should have been disclosed to the plaintiff and, if so, whether the defendant is liable to pay the plaintiff this amount having regard to the duty of an agent to turn it over to his principal and not to any other person. Counsel for the plaintiff submits that, on a finding such as the one I have made, the plaintiff is entitled to this sum of $9,000 as it was a breach of his fiduciary duty to the plaintiff to do otherwise than to pay it to his principal, the plaintiff.

What has caused me some concern is whether a Managing Director of a company can, in his private capacity, accept an agency such as this having regard to the inflexible rule in equity that a person in a fiduciary position (such as an agent or a director) is not, unless otherwise expressly provided, entitled to make a profit without the knowledge and assent of the person to whom the duty is owed. (See *Bray* v. *Ford*[1] and *Regal* v. *Gulliver*[2] per Lord Wright). The defendant claimed early in his evidence, that he was "not allowed to make any private profit".

In my view, the only private profit he possibly could not make was the commission of 2%, which it was open to the Company to take action to recover from the defendant if he had kept it for himself. This he did not do. The secret profit of $9,000 which was never disclosed to the plaintiff could not in my view, have been properly retained by him or, for that matter, by the Company, assuming that the Company had been appointed agent in the first place.

Since the defendant was appointed agent and not the Company, as I find, it follows that the defendant is liable to make good this amount to the plaintiff. If this sum had not been credited to the Company and if the defendant had put it into his own pocket the Company could not, in my view, have successfully pursued any claim against the defendant on the ground that as its managing director he was bound to pay over to the Company whatever secret undisclosed profit he made as the personal agent of the plaintiff.

The question of any waiver of any rights against the defendant by the Company does not arise for two reasons — first, because there were no rights to waive and secondly, because the defendant caused the Company to be credited not only with the commission but the undisclosed profit as well.

The person entitled to the positive rule in equity referred to earlier is the person protected by it. As Upjohn L.J. said in *Boulting* v. *Association of Cinematograph, Television and Allied Technicians*[3]:

"Directors, trustees ... may sometimes be placed in such a position that though their interest and duty conflict, they can properly and honestly give their services to both sides and serve two masters to the great advantage of both ...

To sum up the position, it is clear that the person entitled to the benefit of this positive rule is the person who is protected by it, but he, and he alone, can in proper circumstances relax it ... It cannot be used as a shield by the person owing the duty ..."

It is clear that where a third party has been wronged the defendant cannot use the rule as a shield against such third party — in this case, the plaintiff.

In my judgment, the plaintiff succeeds in his claim for the secret undisclosed profit of $9,000 which he caused to be paid to the Company, with costs and there will be judgment entered in his favour accordingly.

Claim allowed.

Solicitors: *Hilborne & Co.; Chan Chow Wang & Co.*

CHAI AH KAU v. PUBLIC PROSECUTOR

[A.Cr.J. (Wee Chong Jin C.J.) September 6, 1974]
[Singapore — Magistrate's Appeal No. 104 of 1974]

Criminal Law and Procedure — Caning — "Youthful offenders" — "Adults" — Criminal Procedure Code (Cap. 113), s. 220.

In this case the appellant and three others had been convicted at one trial of the offence of armed robbery and at a subsequent trial, on the same day and by the same court, of another similar offence. He was sentenced in the first trial to 18 months imprisonment and 10 strokes of the cane and at the second trial to 3 years imprisonment and 10 strokes of the cane. The appellant was eighteen years of age at the time of his conviction and it was contended on appeal (a) that he was not an "adult" within the meaning of section 220 of the Criminal Procedure Code; and (b) that the sentence of ten strokes of the cane imposed in respect of the second conviction contravened the provisions of section 220 of the Criminal Procedure Code.

Held, dismissing the appeal: (1) section 220 of the Criminal Procedure Code was applicable only in the case where a person is committed at one trial of two or more distinct offences and was therefore not applicable in this case;

(2) the appellant being above the age of sixteen years was an adult within the meaning of section 220 of the Criminal Procedure Code.

MAGISTRATE'S APPEAL.

Wong Meng Meng for the appellant.

Loh Lin Kok (Deputy Public Prosecutor) for the respondent.

Wee Chong Jin C.J.: On 2nd April 1974 the appellant and three others appeared before a District Court. They were charged as follows: —

"That he and three others, on the 21st day of February, 1974, at about 2.25 a.m. at Mount Faber, Singapore, in furtherance of the common intention of them all, committed robbery of cash $300/- and 16 Bahts (Thai currency) in the possession of one Lee Lin Cheng and 1 plastic bracelet valued at $1/- in the possession of one Fang Jung Pin and in committing the said robbery they were armed with a sharp object and he had thereby committed an offence punishable under sections 392 and 397 read with section 34 of the Penal Code (Cap. 103)".

All of them pleaded guilty to the charge and admitted the facts as outlined to the court by the prosecution.

The court accepted their pleas of guilty and convicted them and sentenced each of them to 18 months imprisonment and 10 strokes of the cane. In determining the sentence to be passed the court, on the application of the prosecution and with the consent of the four accused persons, took into consideration an outstanding offence of armed robbery which they admitted to have also committed.

Immediately after these sentences were passed, three of them (one of whom was the appellant) and another person were charged before the same court with having committed an offence of armed robbery. They pleaded guilty as charged and admitted the facts as outlined to the court by the prosecution. The court accepted their pleas of guilty and convicted them and sentenced each of them to 3 years imprisonment and 10 strokes of the cane. The court in determining the sentence to be passed took into consideration, on the application of the prosecution and with the consent of the four accused persons, four outstanding offences of armed robbery which they admitted to have also committed. The court directed that the sentence imposed on the appellant and two of the other three convicted accused persons should run consecutively with the sentence previously imposed on each of them.

The appellant appealed on the ground that the sentence of ten strokes of the cane imposed by the District Judge in respect of the later conviction contravened the provisions of section 220 of the Criminal Procedure Code. Section 220 reads as follows: —

"When a person is convicted at one trial of any two or more distinct offences any two or more of which are legally punishable by caning the combined sentence of caning awarded by the court for any such offences shall not, anything in any Act to the contrary notwithstanding, exceed a total number of twenty-four strokes in the case of adults and ten strokes in the case of youthful offenders".

The appeal was dismissed and I now give my reasons. The short answer is that section 220 is applicable only in the case where a person is convicted *at one trial* (the italics are mine) of two or more distinct offences. In the present appeal the appellant was convicted at one trial of one offence of armed robbery and at a subsequent trial, albeit on the same day and by the same court, of another similar offence.

Counsel for the appellant, on the assumption that the appellant was convicted of the two offences of armed robbery at one trial, contended that the appellant, being eighteen years of age at the date of his conviction, was a "youthful offender" and not an "adult" on the true construction of section 220. He submitted that the term "adult" in section 220 should be construed to mean a person who has reached the age of majority *i.e.* twenty-one years of age and as the section is clearly intended to be comprehensive and draws the line between "adult" offenders and "youthful offenders", an offender who has not reached the age of twenty-one is a youthful offender within the meaning of the section. I rejected that submission for two reasons.

First, "adult" is not defined in the Criminal Procedure Code and it must therefore be given its ordinary dictionary meaning of a person who is mature or grown up. "Adult" cannot be equated with a person who has reached the age of majority unless specifically so defined. Secondly, "youthful offender" is defined in section 2 of the Criminal Procedure Code and the definition reads as follows: —

"2. In this Code, unless there is something repugnant in the subject or context —

'youthful offender' includes any child convicted of any offence punishable by fine or imprisonment who in the absence of legal proof to the contrary is above the age of seven and under the age of sixteen years in the opinion of the court before which such child is convicted".

It follows, in my opinion, that a person under the age of sixteen who is convicted at one trial of any two or more distinct offences comes within the meaning of "youthful offenders" and a person of the age of sixteen and over who is similarly convicted comes within the meaning of "adults" in section 220.

Appeal dismissed.

Solicitors: *Lee & Lee.*